

Alienated advocates: applying Marx's labour theories to criminal legal aid

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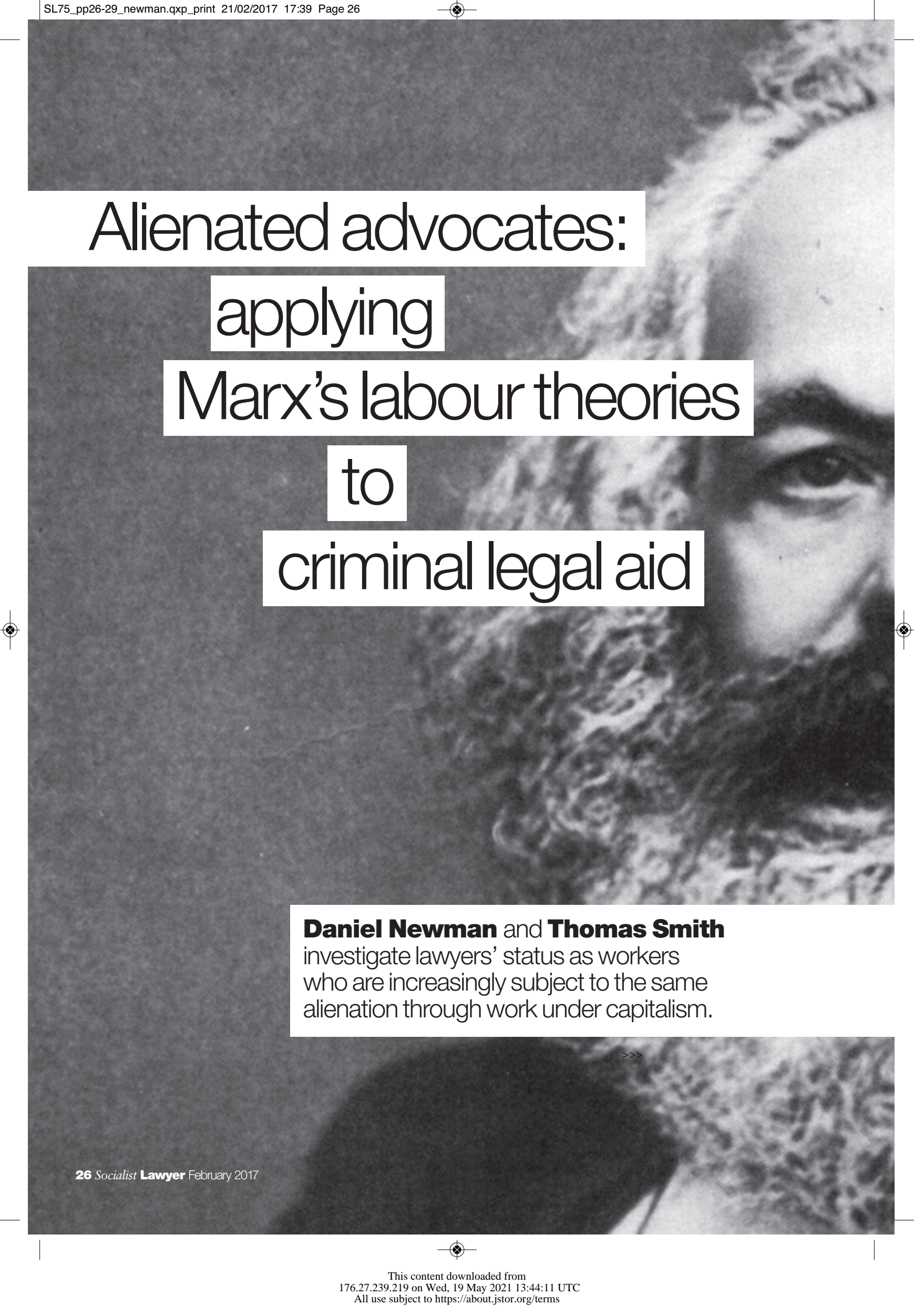
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Alienated advocates:
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Daniel Newman and **Thomas Smith**
investigate lawyers' status as workers
who are increasingly subject to the same
alienation through work under capitalism.

Marx and Marxist theorists have written extensively on the issues of labour, working conditions, and the prospects for people to cultivate satisfying lives under contemporary capitalism. Returning to early – humanistic – Marx allows us to use alienation as a key organising principle to help us understand the experience of workers under capitalism. The theory states that our social forms of life are organised in a way that not only causes inequality and material poverty, but also prevents us from living a fulfilled life.

Marx considered work to be a fundamental social aspect of personal individuality. Our ability to transform the world around us through labour helps us to realise our ultimate humanity. However, the liberatory potential of work is curbed by capitalism, leading to alienation. This idea of alienation refers to a feeling of detached otherness, where people see themselves as somehow foreign to the world around them and distanced from the society in which they live and from the work they do.

The context of alienation: austerity justice

The hallmark of legitimate criminal justice is the ability to distinguish the ‘guilty’ from the ‘innocent’ in an accurate and fair manner. The adversarial system presupposes that the prosecution and defence have roughly equal resources and expertise. In order to achieve that equality of arms defence lawyers should actively and positively defend their clients, systematically exposing weaknesses in the prosecution case through investigation and advocacy. It is not the role of the defence lawyer to assist the prosecution in convicting their client: access to justice requires a lawyer who places the client’s interests first.

However, there are now arguably two barriers to client-centred representation: procedure and funding.

Criminal procedure has been subject to significant alteration, extension and replacement over the last two decades, creating a more conflicted profile for defence lawyers. For example, the ‘inferences’ provisions of section 34 of the Criminal Justice and Public Order Act 1994 and the expansion of defence duties of disclosure under section 5 of the Criminal Procedure and Investigations Act 1996.

More recently, the Criminal Procedure Rules imposed various ‘case management’ duties on all parties in the case; dealing with a case ‘efficiently and expeditiously’, identifying the ‘real issues’ at an early stage in the case, and providing information about witnesses, written evidence and points of law. All these procedural requirements run counter to ‘zealous advocate’ instincts, posing a significant challenge to the traditional primacy of client interests in the defence lawyer’s ethical universe.

Funding, or the lack of it, is equally influential. The protracted battle between the government and defence lawyers over criminal legal aid fees needs no explanation here.

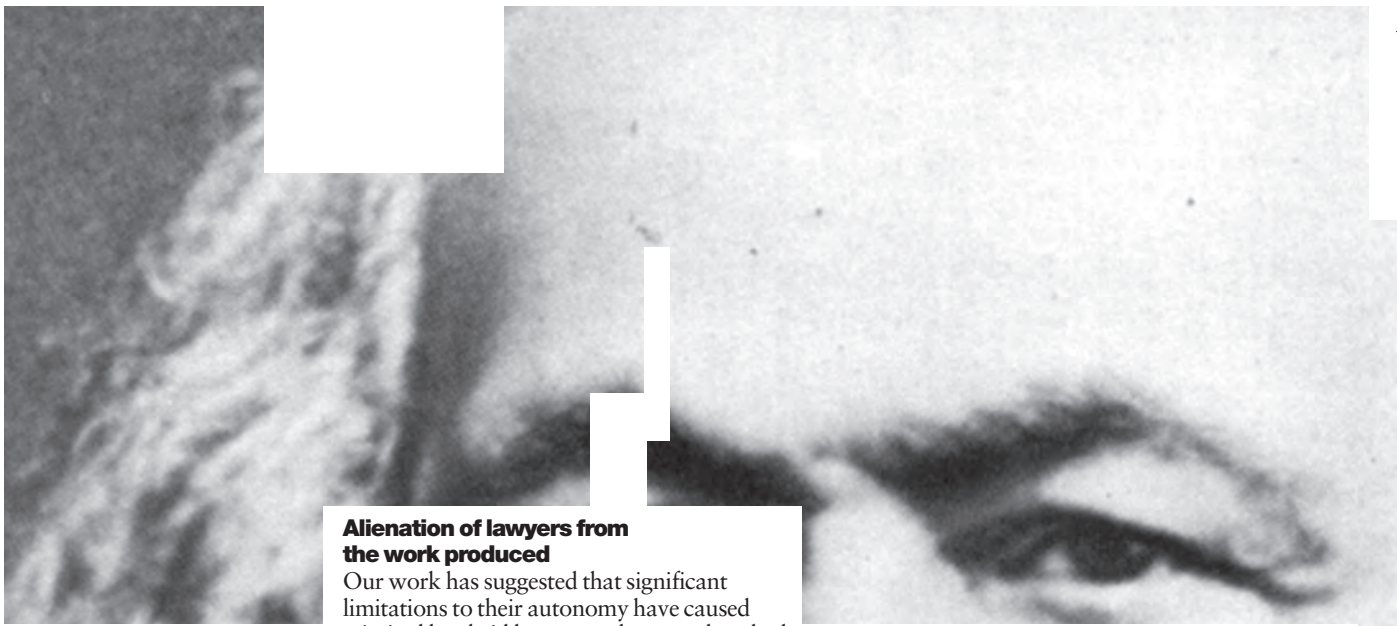
Lawyers as proletariat

In applying the Marxist theory of alienation to our research on criminal legal aid, we considered lawyers as workers who share common cause with more obvious members of Marx’s proletariat. While this is a jarring idea to many, it is arguable that Marx’s shifting definitions of the place of the intelligentsia – to which lawyers might normally be considered to belong – in his class system allows such an interpretation. For example, the intelligentsia are referred to as both the ‘paid wage-labourers’ of the bourgeoisie (arguably linking them to the proletariat) and the ‘the ideological representatives and spokesmen’ of the capitalists.

Alternatively, leading 20th century Marxist Antonio Gramsci proposed the theory of ‘organic intellectuals’ – a cadre of pre-capitalist intellectuals who stood above classes. The rise of capitalism saw organic intellectuals emerge as representatives of one class or another, either by choice or selection; they acted as translators – the ‘tongue of the class’ – who would express their will.

Criminal defence lawyers fit into this model well: they represent the specific interests of clients who are generally drawn from the proletariat, and also represent the class more broadly. They are, we would argue, translators of the needs of lay persons and the demands of complex legal institutions, and mediate the interactions between the class and the institution. They may also be subject to at least some of the pressures of alienation experienced by the traditional proletariat. For example, changes in criminal defence work have diminished the status of lawyers, leading to deprofessionalisation.

In the era of Marx there was no concept of legal aid. In contrast, modern criminal defence lawyers are becoming ‘proletarianised’; where they once subsisted on abundant private wealth, they now struggle as wage labourers, dependent on the ever-shrinking legal aid budget. Defence work is increasingly passed down the chain of experience and qualification (for example, paralegals and accredited representatives) and most legal aid firms are either financially insecure or, in some cases, unviable. Equally, the recent conflict between defence lawyers and the government over fees echoes the tense Marxist dynamic of workers and owners, in which one strives for higher wages whilst the other seeks to lower costs. If the proletariat is the class that does not own the means of production and must sell its labour, then most legally aided criminal defence lawyers can be arguably identified as proletarian. >>>



Alienation of lawyers from the work produced

Our work has suggested that significant limitations to their autonomy have caused criminal legal aid lawyers to become detached from the product of their labour. The burdens of procedure and restrictive funding have affected defence lawyer behaviour to the extent that the balance of power is effectively tilted in favour of agents of the state (the police, prosecution and the court). Defence lawyers tend to collect case files from prosecutors on arrival at court, often discussing the content with them, which can allow their perception of a case to be framed within a prosecutorial narrative rather than that of the defendant. Opportunities to discuss cases with clients prior to initial hearings are often limited.

Reliance on such relationships is in part due to the practical pressures of time, resources and procedural culture. While hostility is not necessarily desirable, overly-close relationships suggest that some defence lawyers may now find more common cause with the prosecution than with their own clients, who will be, consciously or not, categorised as beneath or apart from the legal class. The worrying implication is that the prosecution case (reliant on unchallenged and often incomplete police information) may be afforded undue legitimacy by the defence lawyer.

Defence lawyers are expected to cooperate with the prosecution and the court; instead of traditional adversarialism this prioritises a more passive and compliant role, sympathetic to the prosecution worldview and regarding their clients through a guilty plea lens. There is now significant pressure on defendants – and by extension, their lawyers – to enter a plea of some form as early as possible (or at the very least to identify the ‘real issues’), regardless of important influencing factors such as the completeness of disclosure. While this is not necessarily a surprising attitude for the courts

to adopt given their large workload and limited resources, however, it is troubling to think that defence lawyers may have also been drawn into this mode of thinking about cases.

In this sense, defence lawyers have lost control of their work; the service they offer has become compromised, with important decisions taken by others or at least heavily influenced by the expectations of modern procedural culture. Financial considerations are also relevant; the swift disposal of a case via a guilty plea can often be the most economical, which is an essential consideration for defence lawyers in the highly uncertain legal aid market.

In combination, the pressures of procedural requirements, the cooperative culture, and the looming shadow of financial necessity mean a lesser role for the client in shaping their case, with their views increasingly irrelevant, in comparison to greater needs of the system within which defence lawyers must operate.

Alienation of lawyers from the act of production

Alienation from the work they produce has also gradually alienated defence lawyers from the act of producing. Our work has suggested that the defence role has become increasingly mechanical and routinised, with familiar processes and patterns of behaviour. The drive for guilty pleas and the internalisation of systemic crime control messages (that convicting the guilty is paramount) pressurises and encourages defence lawyers to view clients through this lens and to process them accordingly. For example, lawyers can categorise clients and cases into ideal-type offences and offenders such as a ‘routine theft’, ‘regular druggie’ or ‘Gypsy fighting family’.

>>> Marx's alienation

Marx identified four types of alienation that workers experience under capitalism.

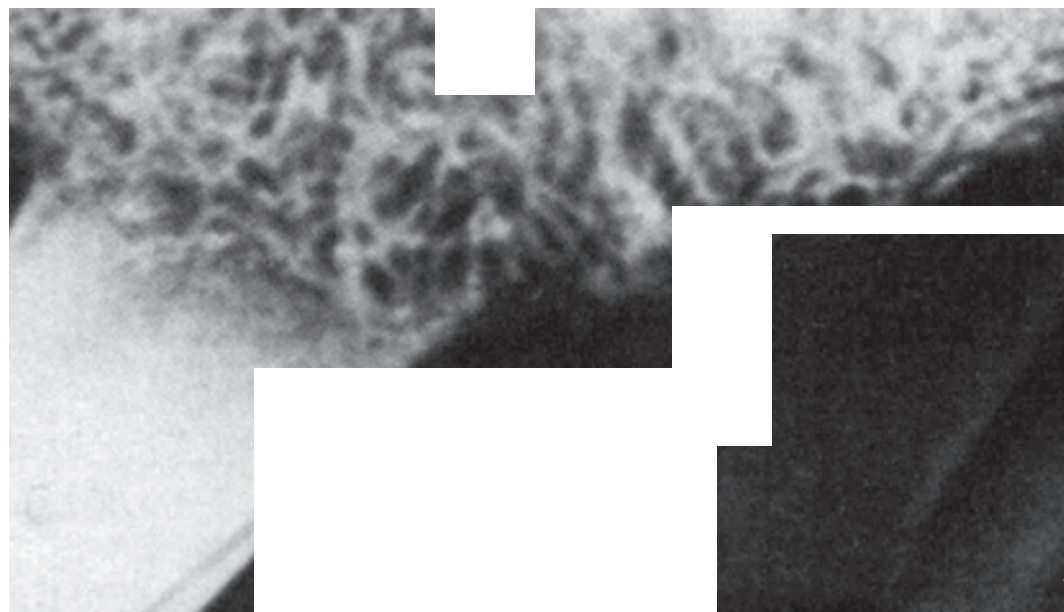
First, the alienation of the worker from the work produced: that is, from the product of their labour. Workers cannot determine the design of a product or the nature of a service and have no control over how it is produced, as capitalists appropriate all aspects of the workers' labour power.

This feeds into the second form of alienation: from the act of production. Without autonomy, the pattern of work becomes monotonous, unstimulating and unsatisfying, characterised by repetition and triviality. Labour becomes a degrading exchange value; an activity performed solely for wages, rather than facilitating self-discovery and fulfilment.

And that contributes to the third form of alienation: from the species being, whereby workers are alienated from themselves as producers. For Marx, humans are distinct from animals through their ability to exercise conscious intention; to go beyond self-sustaining activity by considering the consequences of their actions and to work with purpose towards a valuable end goal; however, this is repressed under capitalism, stunting worker development.

Those three forms of alienation lead to the fourth: alienation from other workers. Work is reduced to a base economic practice and workers become a product to be traded based on financial judgments. This commodification cheapens the act of work; any value as collective effort targeted at improving society is lost, alienating workers from their common cause with each other and imbuing them with individualistic and divisive mind-sets, encouraging conflict.

Applying Marx in this manner may assist in understanding and addressing the impact of neoliberal market forces on defence lawyers and their role in facilitating access to justice. This application is new and provides a strong narrative to underpin the empirical research we have conducted into criminal legal aid lawyers. All four types of alienation were encountered in the observations and interviews that have informed our research, demonstrating how neoliberal ideology and austerity have created barriers to zealous advocacy and affected the lawyer-client relationship.



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belief in the societal utility of their work, these lawyers felt a lack of professional prestige and status.

They felt characterised as the poor cousins of lawyers in better-remunerated branches of the profession, lumbered with socially undesirable clients who brought down their reputation further. Offering neither self-respect nor wider valorisation, defence lawyers are drawn into a vicious circle – a deskilled role leads to increased alienation and to lower quality service, lending credence to the impression that the role lacks social good and deserves low pay – perpetuating the cycle.

Alienation of lawyers from other workers

Defence lawyers can justifiably criticise governments for devaluing their work and the general public for misunderstanding their importance, but our research has provided evidence that lawyers also resent their clients, exemplifying alienation from other workers. Clients keep defence lawyers in business, yet in our research clients were castigated for taking up lawyers' time, criticised for asking questions, and dismissed as whinging when confused.

Rather than a fellow citizen to help and support – a core part of the idealistic vision of criminal defence – some lawyers might see their clients as ‘things’ to work on, obstacles to swift resolution of cases and the receipt of a wage. Defence lawyers have been encouraged to internalise the culture of efficiency and economy, with the primary goal to process the client; just one of several names on a list, part of a workload to be managed.

The human element of the lawyer-client relationship is reduced or lost altogether; the endpoint of the process of alienation sees defence lawyers detached from their humanity, losing sight of any common cause they might share with the clients who they represent.

Diverse clients can be homogenised, treated in a standardised manner, and processed in large quantities. There is little time to listen to and understand individual client needs (which will often be complex), and assure them of the total support and protection of the lawyer. These tasks are as pertinent to a positive client experience as the final result of the case. Ultimately, the system reduces clients to objects on a production line, alienating lawyers from the act of working; this challenges the client's ability to meaningfully understand the notion of justice or effectively or substantively access it via their lawyer.

Alienation of lawyers from the species being

The explicit and implicit denigration of this area of practice has reinforced the impression that it lacks social value. Defence lawyers are not valued as they should be, thus alienating them from their species being. Traditionally, the legal profession has a high social status; moreover, legal aid lawyers consider their work to be virtuous and important, driven by noble motivations like supporting the underdog and protecting the vulnerable. They have what has been labelled a ‘social agenda’, seeing practice as more than simply a job: as a vocation or calling.

Rather than pride, many of the lawyers we have talked to felt devalued by the reality of the work. After years of training and development of expertise, underpinned by a

Conclusion

The value of treating lawyers as workers in a Marxian analysis is that it allows us to understand the pressures they face (and the pressures on the access to justice that they represent and enable) from the wider politico-economic system. The criminal justice system in England and Wales today is best understood as austerity justice. The cuts, outsourcing and efficiency drives of successive government policy in justice spending – as in all aspects of the welfare state – are increasingly downgrading the system, reducing its functions and acting to absolve the state of its responsibility to serve the citizens who rely on it.

Austerity justice, though, should not be understood to have begun with the Coalition and would not be overcome by current Conservative claims to scale back David Cameron's austerity programme or abandon the economic targets of George Osborne. Austerity, rather, represents the more pervasive impact of an anti-state neoliberal ideology that has been prominent in Britain since Thatcher and will be seen to continue for as long as public service provision such as access to justice is starved of resources, risking vulnerable citizens in the name of fiscal probity.

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